IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

MARY ANDREWS and EARVIN KYLES, on Behalf of Themselves and All Others Similarly Situated,	)	
Plaintiffs,	)	**CLASS AND COLLECTIVE ACTION**
v.	)	**CASE NO. 1:14cv135**
TRG Customer Solutions, Inc. d/b/a IBEX Global Solutions,	)	**JUDGE HAYNES**
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, STAY OR TRANSFER PLAINTIFFS' PROPOSED NATIONWIDE COLLECTIVE ACTION

I. INTRODUCTION

In their proposed Third Amended Complaint, Plaintiffs allege that Defendant TRG Customer Solutions, Inc. d/b/a IBEX Global Solutions ("IBEX" or "Defendant") has violated the Fair Labor Standards Act ("FLSA") by failing to compensate certain call center employees for all hours worked. Plaintiffs' proposed Third Amended Complaint also asks the Court to certify a nationwide collective action with respect to that claim.

In the interests of federal comity and judicial economy, Plaintiffs' proposed nationwide collective action should be dismissed, without prejudice, because a nationwide collective action involving the same defendant, the same putative class members, and the same FLSA claims was filed previously in the United States District Court for the District of Columbia. *See Mozell v. TRG Customer Solutions, Inc. d/b/a IBEX Global Solutions*, Case No. 14-cv-2070 (D.D.C.). Pursuant to the first-to-file rule — a rule that has been applied consistently and repeatedly by this

Court — Plaintiffs' proposed nationwide collective action should be dismissed so that the claim may be adjudicated in the first-filed *Mozell* action. Alternatively, if the Court does not wish to dismiss Plaintiffs' proposed nationwide collective action, that claim either should be stayed or transferred to the U.S. District Court for the District of Columbia.[1]

II. FACTUAL BACKGROUND

A. Plaintiffs' First Three Complaints Were Limited To Statewide FLSA Collective Action Claims

On October 9, 2014, Plaintiffs filed the instant case. Doc. Entry No. 1. In their initial Complaint, Plaintiffs alleged that IBEX has violated the FLSA by failing to properly compensate hourly-paid employees working on one of the campaigns[2] at IBEX's Spring Hill, Tennessee call center.[3] *Id.* at ¶¶ 2, 15. Specifically, the initial Complaint alleged that members of one of the Spring Hill, Tennessee campaigns worked "off-the-clock" by performing "preparatory tasks" — *e.g.*, turning on and booting up computers — for which they were not compensated. *Id.* at ¶¶ 18, 21-23. The initial Complaint sought certification of an FLSA collection action comprised of all "hourly-paid call center workers at Defendant's Spring Hill, Tennessee call center . . . who have performed uncompensated work activities related to [one campaign's] services . . . ." *Id.* at ¶ 25.

On November 18, 2014, Plaintiffs filed their First Amended Complaint.[4] Doc. Entry No. 23. The First Amended Complaint contained the same substantive allegations concerning alleged off-the-clock work at IBEX's Spring Hill, Tennessee call center, but expanded the putative FLSA class to all "hourly-paid call center workers at Defendant's Spring Hill, Tennessee call center," not just those employees working on one campaign. *Id.* at ¶¶ 16, 19, 22-24, 27.

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[1] While IBEX continues to believe that the entire matter currently pending before this Court should be subject to arbitration—*see* Doc. Entry Num. 64—it nonetheless wanted to bring the Court's attention to the first-filed nationwide collective action in *Mozell.*

[2] The identity of each of IBEX's clients is proprietary information. A "campaign" is a client account to which an agent is assigned to work. There are three different clients (and accordingly campaigns) at IBEX's Spring Hill, Tennessee facility.

[3] The initial Complaint was filed solely by Plaintiff Mary Andrews. Doc. Entry No. 1.

[4] The First Amended Complaint was filed by Mary Andrews and Earvin Kyles. Doc. Entry No. 23.

Plaintiffs filed their Second Amended Complaint on November 25, 2014.[5] Doc. Entry No. 26. Like the initial Complaint and First Amended Complaint, the Second Amended Complaint was limited to IBEX's Spring Hill, Tennessee call center. *Id.* at ¶¶ 16, 27. Indeed, none of Plaintiffs' first three complaints either alleged FLSA violations concerning IBEX's non-Spring Hill call centers or sought certification of an FLSA collective action beyond the Spring Hill call center.

B. Following Plaintiffs' First Three Complaints, A Nationwide Collective Action Was Filed In The U.S. District Court For The District Of Columbia

On December 8, 2014, Shamika Mozell — a Virginia-based employee represented by attorneys other than Plaintiffs' counsel in this case — filed a complaint against IBEX in the U.S. District Court for the District of Columbia. *See Mozell* Complaint, attached hereto as Ex. 1. Like the first three complaints in this case, *Mozell* alleged that IBEX — which has its principle office in the District of Columbia — has violated the FLSA by failing to compensate hourly call center employees for off-the-clock work, including time spent turning on and booting up computers. *Id.* at ¶¶ 12-14. Unlike the first thee complaints in this case, however, *Mozell* sought certification of a nationwide FLSA collective action. *Id.* at ¶ 23. Importantly, in seeking certification of a nationwide collective action, *Mozell* specifically carved-out the Spring Hill, Tennessee call center for which Plaintiffs had asserted claims in this case. *Id.* at p. 1, n.1 ("This nationwide collective [action] does not include hourly call center employees who worked for Defendant at its Spring Hill, Tennessee call center . . . ."). It is undisputed that *Mozell* was the

[5] The Second Amended Complaint was also filed by Mary Andrews and Earvin Kyles. Doc. Entry No. 26.

first case to either allege FLSA violations outside of the Spring Hill, Tennessee call center or seek certification of a nationwide collective action.

C. After *Mozell* Was Filed, Plaintiffs Attempted To Bring A Nationwide FLSA Collective Action Involving The Same Claims

On December 24, 2014 — fifteen days after *Mozell* was filed in the U.S. District Court for the District of Columbia — Plaintiffs moved for leave to file a Third Amended Complaint.[6] Doc. Entry No. 53. The proposed Third Amended Complaint alleges — for the first time in this case — that IBEX has violated the FLSA by failing to properly compensate hourly-paid employees working in non-Tennessee call centers. Doc. Entry No. 54 at ¶¶ 19, 22-29. Moreover, the proposed Third Amended Complaint seeks nationwide certification of an FLSA collective action that is identical to the class already proposed in *Mozell*. *Id.* at ¶ 31.

III. LEGAL STANDARD

"The first-to-file rule is a well-established doctrine that encourages comity among federal courts of equal rank." *Zide Sport Shop of Ohio, Inc. v. Ed Tobergte Assoc., Inc.*, 16 F. App'x 433, 437 (6th Cir. 2001). "The rule provides that when actions involving nearly identical parties and issues have been filed in two different district courts, the court in which the first suit was filed should generally proceed to judgment." *Id.* (internal quotation marks and citations omitted).

As this Court has noted previously, the purpose of the first-to-file rule is to, among other things, "avoid the waste of duplication of effort by two co-equal district courts [and] to avoid rulings by one district court that may interfere with or trench upon the authority of another

[6] The Third Amended Complaint was filed by Mary Andrews, Earvin Kyles, and Dylan Bertucci. Doc. Entry No. 54.

district court . . . ." *R & B Enters. of Hohenwald, LLC v. Menniger Corp.*, No. 1:10-00022, 2010 WL 4222926, at *1 (M.D. Tenn. Oct. 20, 2010) (J. Haynes) (internal citation omitted).[7]

Application of the first-to-file rule is "particularly appropriate in the context of competing FLSA collective actions, which threaten to present overlapping classes, multiple attempts at certification in two different courts, and complicated settlement negotiations." *Ortiz v. Panera Bread Co.*, No. 1:10-CV-1424, 2011 WL 3353432, at *2 (E.D. Va. Aug. 2, 2011) (collecting cases where first-to-file rule has been applied to overlapping FLSA collective actions); *see also Fuller v. Abercrombie & Fitch Stores, Inc.*, 370 F. Supp. 2d 686, 688-90 (E.D. Tenn. 2005) (applying first-to-file rule to consecutively filed FLSA collective actions).

Where issues bearing on the first-to-file rule have been at stake, this Court has frequently and consistently applied the rule. *See*, *e.g.*, *R & B Enters. of Hohenwald*, 2010 WL 4222926, at *1; *see also Reinsdorf v. Acad., Ltd.*, No. 3-13-0269, 2013 WL 2149673, at *1-2 (M.D. Tenn. May 16, 2013); *W. Exp., Inc. v. Rock Creek Lumber, Inc.*, No. 3:09-0162, 2009 WL 1683404, at *1 (M.D. Tenn. June 16, 2009); *Gibson Guitar Corp. v. Wal-Mart Stores, Inc.*, No. 3:08CV0279, 2008 WL 3472181, at *6-7 (M.D. Tenn. Aug. 8, 2008). While the first-to-file rule is discretionary, it nonetheless "must not be disregarded lightly." *Plantronics, Inc. v. Clarity, LLC*, No. 1:02-cv-126, 2002 WL 32059746, at *3 (E.D. Tenn. July 17, 2002)) (internal citations and quotation marks omitted).

"In determining whether actions are duplicative and the first-to-file rule applies, courts consider (1) the chronology of the actions; (2) the similarity of the parties involved; and (3) the similarity of the issues at stake." *R & B Enters. of Hohenwald*, 2010 WL 4222926, at *2; *see also Fuller*, 370 F. Supp. 2d at 688 (same). Importantly, "[t]he parties and issues need not be

[7] Copies of all unpublished decisions cited in this Memorandum are attached as Exhibit 2.

identical." *R & B Enters. of Hohenwald*, 2010 WL 4222926, at *2. "Rather, the crucial inquiry is whether the parties and issues substantially overlap." *Id.*

Once a court determines that two cases are duplicative and the first-to-file rule should be invoked, it has the discretion to dismiss, stay, or transfer the second-filed action. *See*, *e.g.*, *Reinsdorf*, 2013 WL 2149673, at *2 (citing *SNMP Research, Inc. v. AVAYA, Inc.*, 2013 WL 474846, at *3 (E.D. Tenn. Feb. 7, 2013)); *see also Castillo v. Taco Bell of Am., LLC*, 960 F. Supp. 2d 401, 404-05 (E.D.N.Y. 2013) (dismissing later filed nationwide FLSA collective action without prejudice); *Ortiz*, 2011 WL 3353432, at *2 (same).

IV. ARGUMENT

In this case, the first-to-file rule should apply — and dismissal of Plaintiffs' proposed nationwide collective action is warranted as a matter of law — because Plaintiffs' proposed nationwide collective action substantially overlaps with the previously-filed *Mozell* case.

As noted above, when determining whether to invoke the first-to-file rule, a court should consider: (1) the chronology of the actions; (2) the similarity of the parties involved; and (3) the similarity of the issues at stake. *R & B Enters. of Hohenwald*, 2010 WL 4222926, at *2. Here, each of those factors weighs in favor of dismissing Plaintiffs' nationwide collective action so that the claim may proceed in *Mozell*.

First, there is no question that *Mozell* was the first-filed nationwide FLSA collective action. While the instant case was filed two months before *Mozell*, its FLSA claims applied only to the Spring Hill, Tennessee call center. *See supra* at pp. 2-3. Recognizing that, *Mozell* explicitly excluded the Spring Hill call center from its proposed nationwide class. *Id.* Fifteen days after *Mozell* asserted a nationwide FLSA collective action claim, Plaintiffs in this case attempted to do the same by filing a proposed Third Amended Complaint that, for the first time, included nationwide FLSA collective action claim.[8] *Id.* Given that timeline, it is clear that *Mozell* was the first-filed case seeking certification of a putative nationwide FLSA collective action.

Second, courts routinely have held that FLSA collective actions involve the same parties where the putative classes overlap. *See*, *e.g.*, *Ortiz*, 2011 WL 3353432, at *1-2. It is irrelevant that the two cases have different named plaintiffs and could involve different opt-in plaintiffs. *Fuller*, 370 F. Supp. 2d at 689. Rather, where the named plaintiffs held the same position and are seeking certification of the same putative class, the parties substantially overlap, and application of the first-to-file rule is appropriate. *Id.* Here, the named plaintiffs in both the instant case and *Mozell* are IBEX hourly call center employees seeking certification of a nationwide FLSA collective action. Furthermore, IBEX is the sole defendant in each action. Accordingly, the two cases contain substantially overlapping parties, and application of the first-to-file rule is appropriate.

Third, the nationwide collective action claims in both *Mozell* and the instant case allege that IBEX violated the FLSA by failing to properly compensate hourly employees at its call centers for off-the-clock work, including for time spent turning on and booting up computers. *See supra* at pp. 3-4. As such, the issues involved in the two cases are identical.

In sum, the pleadings in both this case and *Mozell* plainly show that *Mozell* was the first-filed nationwide FLSA collective action and that the putative nationwide collective actions in the two cases involve substantially overlapping parties and issues. Consequently, dismissal of the nationwide collective action claim contained in Plaintiffs' proposed Third Amended Complaint is warranted so that the claim may be adjudicated via the first-filed *Mozell* case. *See*, *e.g.*,

[8] Given that *Mozell* explicitly carved-out the Spring Hill, Tennessee call center from its putative class and sought certification only for FLSA claims that were not contained in any of the previously-filed complaints in this case, it would be unjust to permit Plaintiffs to over-run that case and proceed with a later-filed nationwide collective action.

Castillo, 960 F. Supp. 2d at 404-05 (stating that dismissal is most appropriate remedy for overlapping FLSA collective actions); *Ortiz*, 2011 WL 3353432, at *2 (same). Alternatively, it would be appropriate for the Court to stay the proposed Third Amended Complaint's putative nationwide collective action or transfer that claim to the U.S. District Court for the District of Columbia. *See*, *e.g.*, *Reinsdorf*, 2013 WL 2149673, at *1-2 (staying case pursuant to first-to-file rule); *Fuller*, 370 F. Supp. 2d at 688-91 (transferring FLSA collective action pursuant to first-to-file rule).

V. CONCLUSION

Consistent with the first-to-file rule, Plaintiffs' proposed FLSA nationwide collective action should be dismissed (without prejudice), stayed, or transferred to the U.S. District Court for the District of Columbia.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via the Court's electronic case filing system, upon the following counsel of record:

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On this the 21st day of January, 2015.

s/ K. Coe Heard